Kamari bin Kasan v Malaysian Maritime Academy Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3–25–124 OF 1998
FAIZA TAMBY CHIK J
13 SEPTEMBER 1999

Labour Law *— Employment — Dismissal — Failure to issue warning letter — Victimization of employee — Employee not allowed to participate in disciplinary proceedings — Delegation of right to discipline from disciplinary board to employer — Whether employer breached employment contract — Whether victimization is consideration for constructive dismissal*

The applicant/claimant was an employee of the respondent. On 23 June 1992, the respondent — vide a letter signed by one Captain Wan Shukry bin Wan Karma — required the claimant to show cause why disciplinary action should not be taken against him for alleged misconduct and unsatisfactory work. Later, the respondent rejected the claimant's reply and submitted a complaint to the disciplinary board. The claimant was invited to attend the disciplinary board's sitting but was neither allowed to enter nor participate. Further, Captain Wan Shukry was one of the members of the tribunal. The disciplinary board decided to reduce the applicant's rank and salary. The respondent, by a letter dated 15 September 1992 informed the claimant that the latter has been stripped of his post and relinquished of all duties as a deputy registrar. The claimant was given an empty room to sit with no work and no supporting staff to work with. Though the claimant had protested in writing, he was called upon by Captain Wan Shukry to resign. In fact, the respondent proceeded to post a notice dated 3 November 1992 on the claimant's room door informing everyone that the claimant is stripped of all duties despite being exonerated by the appeal board. The claimant proceeded to file a complaint at the Industrial Court. The Industrial Court found in favour of the respondent. The applicant applied for an order of certiorari to quash the award.

Held, allowing the application:

(1) The chairman of the Industrial Court erred in law and in facts when he stated that the applicant failed to prove that the respondent has breached the contract of employment. The respondent failed to adhere to Bahagian IV para 3(h) of 'Peraturan-Peraturan Perkhidmatan Pegawai/Kakitangan Akademi Laut Malaysia' as no warning letter was issued to the claimant and no report in writing was ever prepared by the respondent to be handed to the disciplinary board (see p 89B–E). Further, the Industrial Court erred in law when the chairman said that the respondent had the right to take disciplinary proceeding against the claimant. Only the disciplinary board has the sole right

A to punish and the board cannot delegate punishment to the respondent (see p 89H–I) .

(2) The chairman erred in law and in fact when he decided that victimization was not pleaded and in any event, not a factor to be considered in a claim for constructive dismissal. The claimant's B dismissal was unlawful, unfair and tainted with mala fide. There was victimization of the claimant by the respondent. By disallowing the claimant to participate in the disciplinary board meeting, the principle of natural justice of audi alteram partem was not adhered to (see pp 90G, 92B). The complaint letter dated C 23 June 1999 addressed to the claimant was sent by Captain Wan Shukry bin Wan Karma. The same Captain Wan Shukry also sat in the disciplinary board (see p 92D). The respondent had also omitted to file an affidavit-in-reply. The assertions made by the claimant have not been denied or disputed by the respondent (see p 94D).

D

[Bahasa Malaysia summary

Pemohon/pihak menuntut adalah pekerja responden. Pada 23 Jun 1992, responden — melalui surat yang ditandatangani oleh Kapten E Wan Shukry bin Wan Karma — telah mengkehendaki pihak menuntut untuk menunjukkan sebab mengapa tindakan disiplin tidak patut dibawa terhadapnya untuk pengataan salah laku dan juga kerja yang tidak memuaskan. Kemudiannya, responden telah menolak jawapan pihak menuntut dan mengemukakan aduan kepada jawatankuasa disiplin. Pihak menuntut telah dijemput untuk F menghadiri sidang jawatankuasa disiplin tetapi tidak dibenarkan untuk masuk atau terlibat. Selanjutnya, Kapten Wan Shukry adalah salah seorang daripada anggota di dalam tribunal tersebut. Jawatankuasa disiplin memutuskan untuk menurunkan pangkat dan gaji pemohon. Responden, melalui surat bertarikh 15 September G 1992, telah memberitahu pihak menuntut bahawa beliau telah dilucutkan jawatannya dan dilepaskan daripada semua tugas sebagai timbalan pendaftar. Pihak menuntut diberikan suatu bilik kosong untuk duduk tanpa kerja dan tanpa kakitangan sokongan yang lain. Walaupun pihak menuntut telah membantah secara bertulis, beliau H telah dipanggil oleh Kapten Wan Shukry untuk meletak jawatan. Hakikatnya, responden terus menampal suatu notis bertarikh 3 November 1992 di pintu bilik pihak menuntut untuk mengumumkan kepada orang ramai bahawa pihak menuntut dilucutkan segala tugasnya walaupun telah dilepaskan daripada tuduhan oleh jawatankuasa rayuan. Pemohon terus memfailkan I aduan di Mahkamah Perusahaan. Mahkamah Perusahaan memberikan keputusan yang memihak responden. Pemohon telah memohon untuk perintah certiorari untuk membatalkan award tersebut.

Diputuskan, membenarkan permohonan tersebut: A

(1) Pengerusi Mahkamah Perusahaan telah silap dari segi undang-undang dan fakta apabila beliau menyatakan bahawa pemohon telah gagal untuk mematuhi Bahagian IV para 3(h) 'Peraturan-Peraturan Perkhidmatan Pegawai/Kakitangan Akademi Laut Malaysia' oleh kerana tiada surat amaran telah dikeluarkan B kepada pihak menuntut dan tiada laporan bertulis telah disediakan oleh responden untuk diserahkan kepada jawatankuasa disiplin (lihat ms 89B–E). Selanjutnya, Mahkamah Perusahaan silap dari segi undang-undang apabila pengerusi tersebut mengatakan bahawa responden mempunyai hak untuk mengadakan prosiding disiplin terhadap pihak menuntut. Hanya C jawatankuasa disiplin mempunyai hak tunggal untuk menghukum dan jawatankuasa tidak boleh menyerahkan tugas menghukum kepada responden (lihat ms 89H–I).

(2) Pengerusi telah silap dari segi undang-undang dan fakta apabila beliau memutuskan bahawa pemangsaan bukanlah suatu faktor D yang perlu dipertimbangkan di dalam suatu tuntutan pemecatan konstruktif. Pemecatan pihak menuntut adalah menyalahi undang-undang, tidak adil dan dipengaruhi mala fide. Terdapat pemangsaan pihak menuntut oleh responden. Dengan tidak membenarkan pihak menuntut untuk terlibat di dalam mesyuarat jawatankuasa disiplin, prinsip keadilan asasi yang termasuk audi E alteram partem telah tidak dipatuhi (lihat ms 90G, 92B). Surat aduan bertarikh 23 Jun 1999 yang dialamatkan kepada pihak menuntut telah dihantar oleh Kapten Wan Shukry bin Wan Karma. Kapten yang sama juga terlibat di dalam jawatankuasa disiplin (lihat ms 92D). Responden juga ketinggalan di dalam memfailkan afidavit balasan. Penegasan-penegasan yang dibuat F oleh pihak menuntut tidak dinafikan atau dipertikaikan oleh responden (lihat ms 94D).]

Notes

G

For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 723–730.

For cases on rules of natural justice in cases involving dismissal, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 587–591.

H

Cases referred to

Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Bank Bumiputra (M) Bhd v Mohd Noordin bin Abdullah Johore [1992] 2 ILR 254 (refd)

Bosco Philip v Electrical Industry Workers Union & Anor [1995] 1 AMR I 169 (refd)

Chong Kok Lim & Ors v Yong Su Hian [1979] 2 MLJ 11 (refd)

De Souza Lionel Jerome v Attorney General [1993] 1 SLR 882 (refd)
Ho Yoke Kwei & Anor v Ong Eng Hin [1997] 4 MLJ 292 (refd)
Ismail bin Abd Halid & Ors v National Union of Newspaper Workers [1993] 3 MLJ 541 (refd)
Lionel v Government of Malaysia [1971] 2 MLJ 172 (refd)
Lotteries Corporation (Sabah) Sdn Bhd v Vincent Lee, Industrial Court, Kota Kinabalu [1991] I ILR 544 (refd)
Maraex (M) Sdn Bhd v Abdul Rahim b Abdul Rawi & 124 [1992] 1 ILR 187 (refd)
Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 MLJ 281 (refd)
Non Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Firebricks Sdn Bhd [1976] 2 MLJ 67 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Perwira Affin Bank Berhad (dahulunya dikenali sebagai Perwira Habib Bank (M) Bhd) v Lorrain Esme Osman [1996] 4 MLJ 656 (refd)
Rakyat Merchant Banker Bhd v Abdul Rahim Aki & Ors [1998] 6 MLJ 299 (refd)

Legislation referred to

Industrial Relations Act of 1967 s 20(3)
Rules of the High Court 1980 O 53 r 1(2)

Annou Xavier (*Reuben Annou & Co*) for the applicant.
Fatima Tahir Ali (*SF Pang & Chandra*) for the respondent.

Faiza Tamby Chik J: This is an application by the applicant/claimant under encl 10 for an order of certiorari to quash the award granted on 25 September 1998, against the above-named claimant, En Kamari bin Kasan.

This application for an order of certiorari is supported by:

(i) An ex parte notice of originating motion dated 5 November 1998:
(ii) Statement pursuant to O 53 r 1(2) of the Rules of the High Court 1980;
(iii) Affidavit in support of Kamari bin Kasan (NRIC No 571107–01–5421) affirmed on 4 November 1998 ('the affidavit');
(iv) Order for leave for an order of certiorari dated 14 April 1999;
(v) Notice of originating motion dated 26 April 1999 ('encl 10');
(vi) Affidavit of Kamari bin Kasan affirmed on 23 April 1999.

A complaint was lodged by the claimant under s 20(3) of the Industrial Relations Act of 1967 arising out of the dismissal of claimant by Malaysian Maritime Academy Sdn Bhd ('the respondent'). The claimant's gross salary and other benefits were RM4,232.48 per month (see para 4 of the affidavit at p 218). On 23 June 1992, the respondent required the claimant to show cause why disciplinary action should not be taken against him for alleged misconduct and unsatisfactory work on four charges levelled against him.

The letter dated 23 June 1992 was lodged and signed by one Captain Wan Shukry bin Wan Karma (see para 5 of the affidavit at p 219). The claimant replied to the above allegations vide his letter dated 4 July 1992 (see para 6 of the affidavit at p 343). The respondent rejected the claimant's reply and submitted a complaint to the disciplinary board on 7 August 1992 with no reasons given for the said rejection (see para 7 of the affidavit). A report was sent to the disciplinary board recommending 'Dengan tujuan buang kerja' and was prepared by Captain Wan Shukry bin Wan Karma and Jailani bin Md Dom (see para 8 of the affidavit). The claimant was invited to attend the disciplinary board's sitting on 25 August 1992 but was neither allowed to enter nor participate. Further, Captain Wan Shukry was one of the members of the tribunal (see para 10 of the affidavit at p 347).

The disciplinary board decided as follows:

(a) on the first charge, rank to be reduced (demoted);

(b) on the second charge, salary to be deducted;

(c) on the third charge, salary to be deducted;

(d) on the fourth charge, written warning to be given.

(See para 11 of the affidavit at p 221). However, the respondent only informed the claimant of the disciplinary board's decision on 25 August 1992 vide their letter dated 14 September 1992 (see p 221 of the affidavit). The respondent, by a letter dated 15 September 1992 informed the claimant that the latter has been stripped of his post and relinquished of all duties as a deputy registrar with effective from 14 September 1992 (see para 13 of the affidavit at p 223). The claimant was given an empty room to sit with no work, with no supporting staff to work with. Though the claimant had protested in writing, he was called upon by Captain Wan Shukry to resign. Hence, the claimant lodged a police report to this effect (see para 14 of the affidavit at pp 224 to 230).

The claimant then appealed against the disciplinary board's findings on 19 September 1992. On 31 October 1992, the respondent/company informed the claimant of the appeal board's decision on 14 October 1992, some 16 days later, revising the punishments meted out by the disciplinary board. However, the decision of the appeal board was only communicated to the claimant on 6 November 1992, some 21 days later by the respondent (see paras 16 and 17 of the affidavit at pp 231–241, 348, 350 and 369–371). From 14 September 1992, the claimant was never assigned to a post nor given any duties. In fact, the respondent proceeded to post a notice dated 3 November 1992 on the claimant's room door informing everyone that the claimant is stripped of all duties despite being exonerated by the appeal board (see para 19 of the affidavit at p 299). The respondent/Company had sent a letter dated 14 November 1992 to the claimant requesting the claimant to report back for work. This letter was signed by one Wan Abdul Rahman bin Wan Nawang as Deputy Registrar (Administration) (see para 20 of the affidavit at p 298). The claimant was deeply affected by the fact that someone had expeditiously replaced him as a deputy registrar (Administration) and had victimized and embarrassed the claimant (see

A para 21 of the affidavit at pp 284–291). The claimant proceeded to file this complaint at the Industrial Court on 7 November 1992 (see p 34 of the affidavit).

It is submitted by the claimant that the Industrial Court erred in law and fact in making its Award No 509/98 dated 25 September 1998 as stated B in paras 23 and 24 of the affidavit. Further, this review also lies in the manner the Industrial Court arrived at its decision in granting the award which reasons are laid down succinctly in paras 25–31 of the affidavit.

It is submitted by the claimant that the chairman of the Industrial Court erred in law and in facts when he stated that the applicant failed to prove that the respondent has breached the contract of employment. The contract C of employment (or 'Peraturan-Peraturan Perkhidmatan Pegawai/ Kakitangan Akademi Laut Malaysia') is found at pp 304–337 of the affidavit. The respondent failed to adhere to 'Bahagian IV para 3(h) of the contract of employment (see p 321 of the affidavit). The proper procedure under para 3(h) are as follows:

D (i) After obtaining a written report from his subordinates, a superior officer may issue a warning letter;

(ii) In the event an employee continues with his unsatisfactory behaviour, the superior officer shall then prepare a report in writing to be handed over to the disciplinary board;

E (iii) The disciplinary board, after due consideration of the report, may issue a written warning to an employee.

In the instant case, no warning letter was ever issued to the claimant (see p 377 of the affidavit). No report in writing was ever prepared by Captain Wan Shukry and/or Jailani Md Dom to be handed to the disciplinary board. F In *Bosco Philip v Electrical Industry Workers Union & Anor* [1995] 1 AMR 169 it was held therein that the decision making process by the executive council breached the rules of natural justice as certain members, who were involved in the inquiry, should not have participated and voted in the meeting of the executive council. Hence, the court held that there was error of jurisdiction and there was a breach of natural justice as the company in G that case did not comply with the necessary provisions in the rules and constitution of the union. The court in *Bosco's case* also relied on the case of *Lionel v Government of Malaysia* [1971] 2 MLJ 172 where the Federal Court in Lionel's case held that the dismissal of the appellant was contrary to the Constitution of the said company and therefore void. In *De Souza Lionel Jerome v Attorney General* [1993] 1 SLR 882, the court held the dismissal of H the plaintiff, a police officer, was unfair as there was breach of the Police Force Regulations and breach of the said provisions rendered the plaintiffs dismissal a nullity.

It is observed that the court erred in law when the chairman said that the respondent had the right to take disciplinary proceeding against the I claimant. Only the disciplinary board has the sole right to punish and the board cannot delegate punishment to the respondent. Therefore, the letters from the respondent dated 15 September 1992 (p 223 of the affidavit) and

6 November 1992 (p 297 of the affidavit) were defective under the said contract of employment and therefore void. In the instant case, the appeal board abdicated from their duties in failing to exonerate the applicant of the second and third charges by leaving it to the discretion of the company in breach of the 'Tatatertib Rules' in the contract of employment. In *De Souza*'s case, the court held that the 'commanding officer cannot delegate his duty to another officer his duty to access the findings ...'. In cl 3(h) of the Tatatertib Rules', it is stated clearly that:

> ... Pihak berkuasa tatatertib, setelah menimbang laporan itu, boleh mengambil tindakan mengeluarkan amaran secara bertulis, menangguh kenaikan gaji ... .

And this does not in any manner delegates authority to the respondent. By sending out both the stated letters dated 15 September 1992 and 6 November 1992 to the claimant by the respondent, it was in direct violation of the Tatatertib Rules' and thus, the respondent had acted ultra vires.

Raja Azlan Shah FJ (as DYMM then was) in the case of *Non Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Firebricks Sdn Bhd* [1976] 2 MLJ 67 said at p 68:

> (The Industrial Relations Act 1967) is intended to be 'a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts.'

The case of *Ismail bin Abd Halid & Ors v National Union of Newspaper Workers* [1993] 3 MLJ 541 held that '... decision to suspend them was a nullity and void ab initio because the Exco acted beyond its jurisdiction in a manner wholly unauthorized by the constitution.'

The court also relied on *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11 and held that the courts have the power to intervene the decision of a domestic tribunal in relation to the expulsion of a member.

It is submitted that the chairman erred in law and in fact when he decided that victimization was not pleaded and in any event, not a factor to be considered in a claim for constructive dismissal (see p 506 of the affidavit). The claimant's dismissal was unlawful, unfair and tainted with mala fide in that there was victimization of the claimant by the respondent. On the first charge, the claimant was only charged for the unauthorized use of motorcar No MU 7521 and not the motor van belonging to the respondent, contrary to the letter dated 7 May 1992 to the applicant (see p 302 of the affidavit). The applicant had replied to the respondent's charges vide his letter dated 4 July 1992 (see p 343 of the affidavit) but was rejected to by the respondent with no reasons given for the said rejection (see para 7 of the affidavit). The claimant was invited to attend a disciplinary board's meeting on 25 August 1992 but was not allowed to enter the said meeting room (see para 10 of the affidavit). The disciplinary board arrived at it's decision on 25 August 1992 and the said decision was

A only communicated to the claimant only on 14 September 1992 (see p 221 of the affidavit). It was the respondent, not the disciplinary board that informed the claimant that the same had been stripped off his post and relinquished of all duties. This is a contravention of cl 3(h) of the contract of employment (see p 223 in the affidavit). The claimant was given an empty room to sit with no duties. He was not given any staff to work with
B (see p 224–229 in the affidavit). The claimant then appealed to the appeal board which decided on 14 October 1992. However, the claimant was only informed of the appeal board's decision on 31 October 1992, some 16 days later (see p 348 and 350 in the affidavit). The respondent purposely stuck a notice on the door of the claimant's office informing all other colleagues
C that the claimant was hereby dismissed to further embarrass and victimize the claimant. Neither the disciplinary board nor the appeal board has ever communicated to the claimant, but for Captain Wan Shukry and Jailani Md Dom who had sent disparaging letters to the applicant, I am of the view that these acts tantamounted to victimization of the applicant.

D In *Lotteries Corp (Sabah) Sdn Bhd v Vincent Lee, Industrial Court, Kota Kinabalu* [1991] I ILR 544, the claimant in that case was:

(i) stripped of all power and duties;

(ii) drastically demoted;

(iii) given an altered job function;

E (iv) put in 'cold storage';

(v) not given work, contrary to his contract of employment;

(vi) not given any reasons for all allegations that were levelled against him.

The court in the said case held that the company was guilty of a total and
F unilateral repudiation of the claimant's contract of employment. The court further stated that the constructive dismissal of the claimant was found to be unreasonable, unfair labour practice and victimization without just cause or excuse.

In *Ismail bin Abd Halid & Ors v National Union of Newspaper Workers* [1993] 3 MLJ 541, the court held that if notice is given to a claimant to
G attend a disciplinary meeting and if that person is deliberately excluded from attending, that meeting would be held illegal.

In the case of *Bank Bumiputra (M) Bhd v Mohd Noordin bin Abdullah Johore* [1992] 2 ILR 254, the court said:

H > It is clear, with respect, that the CGM was prejudiced by the charges that could not be substantiated and in being so prejudiced has demonstrated a distinct bias which was decisive when he overruled the recommendations of a member of the panel of inquiry that a serious letter of warning be issued and the recommendation of two members of the panel that the claimant be demoted or reduced in rank.

I > It is neither legal nor equitable nor in good conscience and in industrial law an unfair labour practice to condemn the claimant to a dismissal by taking into consideration charges and activities that have not been proved or substantiated, charges upon which the claimant has been acquitted.

This grave injustice is accentuated and aggravated by the undisputed fact that the claimant was given no opportunity whatsoever to be heard on the CGM's decision to take into consideration and be unduly influenced by unproven charges to cast doubt on the claimant's integrity, and to use this as a ground to dismiss the claimant.

In the instant case by disallowing the claimant to participate in the disciplinary board meeting goes against the principle of natural justice of audi alteram partem. Further, by disallowing the claimant to attend the said meeting, his rights were destroyed, defeated or prejudiced. At the trial in the Industrial Court, the claimant gave evidence that he did not get along with his superiors, his superiors frequently spread malicious and disparaging remarks about him and to his colleagues by pasting a notice on his room door, the decision of the appeal board was only communicated to him some 16 days later and not immediately, and his post was stripped off. The claimant was not able to put forth his case at the disciplinary board's meeting and was shut-out and put in the dark. The chairman erred in law and fact in that the Industrial Court failed to follow the principle of natural justice and right to be heard (audi alteram partem rule). The complaint letter dated 23 June 1999 (p 219 of the affidavit) addressed to the claimant was sent by Captain Wan Shukry bin Wan Karma. The same Captain Wan Shukry also sat in the disciplinary board with Jailani bin Md Dom being present (see p 355 of the affidavit). In *De Souza*'s case , the commanding officer had, inter alia, failed to rely on the assessment report of the claimant and denied the claimant of the right to be heard. The court stated at p 886:

In *R v Rand & Ors* which was decided in 1866, Blackburn J said at pp 232–233:

'Wherever there is a *real likelihood* that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this court would not interfere; ...' (Emphasis added.)

A few years later, in *Eckersley v Mersey Docks and Habour Board* Lord Esher MR at p 67 referred to:

'... the doctrine which is applied to judges, not merely of the superior courts, but to all judges — that, not only must they be not biased, but that, even though it be demonstrated that they would not be biased, they ought not to act as judges in a matter where the circumstances are such that people — *not necessarily reasonable people, but many people — would suspect them of being biased* ... .' (Emphasis added.)

...

In *R v Camborne Justices, ex p Pearce*, information under the Food and Drugs Act were laid against Pearce by an officer on behalf of a county council. The clerk to the justices was sent for by the chairman to advise the justices on a point of law. During the time that he was with them, the justices did not discuss the facts of the case and the clerk, having given his advice, returned to the court. Unknown to Pearce at the hearing, the clerk was at the time a member of the council, but was not a member of the council's health committee before which the proceedings against Pearce had been discussed. The justices convicted Pearce. He applied for an order of certiorari to quash

A the conviction on the ground that, in the circumstances, a reasonable suspicion of bias might arise. Slade J delivering the judgment of the court said at p 47:

> 'It is of course, clear that any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What
B interest short of that will suffice? In the present case it is claimed that a reasonable suspicion of bias is enough.'

He then reviewed the authorities, including *Eckersley v Mersey Docks* and *Harbour Board, R (Donoghue) v Justices of County Cork* and *R v Sussex Justices, ex p McCarthy*, and then said at p 51:

C > 'In the judgment of this court the right test is that prescribed by Blackburn J, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown.'

...

D In *Alkaff & Co v Governor-in-Council & Ors, the governor-in-council* appointed the commissioner of land to enquire and report on three back lane proposals made by the Singapore Improvement Trust under the Municipal Ordinance and the Singapore Improvement Ordinance. He entered upon the enquiry and reported on the proposals making recommendations to the Governor-in-Council. The commissioner was in fact also a member of the Trust. Applications were made by Alkaff & Co for writs of certiorari to quash the
E back lane orders. Terrell Ag CJ reviewed the authorities and said at p 215:

> 'So in the present case the fact that Mr Ebden (the Commissioner), was a member of the Improvement Trust, which had approved the back lane schemes, and had then, as the officer appointed under s 144(1) (of the Municipal Ordinance), inquired into the merits of these same schemes,
F could only result in a suspicion that justice might not be done.'

Thomas CJ (FMS) also reviewed the authorities and said at p 220:

> 'I conclude that there did exist a fear of prejudice and a possibility of being considered to be biased which would infringe the high criterion that not only must justice be done but also must appear to be done.'

G *Halbury's Law of England on Administrative Law*, Vol 1 stated that 'where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the court will grant an order of prohibition to prevent it from adjudicating, or an order of certiorari to quash a determination arrived by it ...' .

H In *Maraex (M) Sdn Bhd v Abdul Rahim bin Abdul Rawi* [1992] 1 ILR 187, the court held that:

> The key element of the definition of constructive dismissal is that the employee must have been entitled to leave without notice because the employer's behaviour towards him was so unreasonable that he could not be
I expected to stay.

In the statement of case dated 10 January 1994, the claimant had pleaded dismissal without just cause. The burden of proving constructive dismissal

is on the claimant on a balance of probabilities. He had to prove that the conduct of the company amounted to a breach of contract which entitled him to terminate the contract summarily. It is evidently clear that the claimant was dismissed without just excuse. On 1 November 1992, the claimant wrote to the respondent under a state of confusion, disappointment, frustration and in a state of down trodden that since receiving the letter dated 14 November 1992 from one Wan Abdul Rahman bin Wan Nawang, he considered himself to be constructively dismissed as of 15 November 1992 and all the events leading to his dismissal were cumulative (see pp 284–291 and 298 of the affidavit).

Copies of the said notice of motion dated 5 November 1998, statement, the affidavit, notice of originating motion dated 26 April 1999 ('encl 10'), the supporting affidavit and order for leave for an order of certiorari dated 11 April 1999 were duly served onto the respondent vide the claimant's solicitors letter dated 14 June 1999. On the hearing of the said originating motion on 6 July 1999, the respondent's solicitors sought adjournment from the court to file an affidavit-in-reply within two weeks. To date, the respondent had omitted to file an affidavit-in-reply. The assertions made by the claimant have not been denied or disputed by the respondent. In the case of *Ho Yoke Kwei & Anor v Ong Eng Hin* [1997] 4 MLJ 292 at p 310 the learned judge applied the principle enunciated in *Alloy Automative Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 where it was held that 'an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted ...'. Similarly in *Perwira Affin Bank Berhad (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Berhad) v Lorrain Esme Osman* [1996] 4 MLJ 656, the Court held that if one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted (per Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). The sealed copies of encl 10 together with the claimant's Affidavits were duly served and acknowledged receipt by the respondent. In the Court of Appeal case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85, the court held that the 14 day period under O 32 r 13(2)(b) of the Rules of the High Court 1980 starts to run from the time the Affidavit is served onto the party together with the sealed copy of the summons. Further, the appellate court went to construe that O 32 r 13(2)(b) makes it mandatory for such an affidavit-in-reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. The court further went to state that this provision is used in proceedings to ' ... prevent last minute filing and service of such affidavits which ... would have necessitated such application being adjourned repeatedly, thereby causing delay ...'. Further, the court in *Rakyat Merchant Banker Bhd v Abdul Rahim Aki & Ors* [1998] 6 MLJ 299 applied the principle in *Pua Lai Ong*'s case whereby any affidavits he intends to reply must be filed and served within 14 days from the date on which the summons and supporting affidavit was filed onto him. I am of the view that the respondent/company had omitted to file an affidavit-in-reply to the affidavit and hence, the preliminary objection is allowed with costs.

A On the basis of the above reasons an order of certiorari is hereby granted to quash the award No 509/98 of the Industrial Court granted on 25 September 1998.

Application allowed.

B Reported by Benjamin Yong

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